**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the matter of | ) | |
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| | ) | WC Docket No. 17-108 |
| Restoring Internet Freedom | ) | |
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REPLY COMMENTS OF CALINNOVATES

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## INTRODUCTION

CALinnovates is a coalition comprised of technology leaders, recent startups, traditional telecommunications companies, entrepreneurs, and venture capitalists, all united around a shared desire to ensure that the Internet remains a vibrant and open space in which innovation continues to thrive.[1] In the comments[2] that CALinnovates submitted in this proceeding,[3] we explained that to foster an open, innovative and competitive Internet ecosystem, net neutrality principles must exist without subjecting the Internet to antiquated, ill-fitting regulation.[4] The two mandates are not incompatible. We also noted the uncertainty caused by decades of Congressional inaction, which has left regulation of the Internet in the hands of a single agency whose views have fluctuated dramatically between Administrations, creating a blindfolded game of musical chairs designed to perpetually leave one participant without a seat. Our central arguments have been bolstered by dozens of comments on both sides—by those who remain committed to net neutrality, and by those who warn about the pitfalls of overregulation. It is now time for Congress to step forward to harmonize policy for the next critical phase of innovative growth by establishing clear guidelines that are fair, free, and future-focused.

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[1] For more information about CALinnovates, please visit our website, http://www.calinnovates.org/.

[2] *In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Comments of CALinnovates (July 16, 2017) ("CALinnovates Internet Freedom Comments").

[3] *In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Notice of Proposed Rulemaking (rel. May 23, 2017) ("Internet Freedom NPRM").

[4] Additionally, CALinnovates supplemented its comment with an economic analysis it commissioned from Dennis W. Carlton and Bryan Keating discussing the harms caused by overregulation and regulatory uncertainty. *See* CALinnovates Internet Freedom Comments, Attachment.

New legislation should ensure that certain per se anti-competitive practices are prohibited, and that the stifling of innovation and new entry by competitors is prevented. Amid the agency tumult, bipartisan Congressional action seems now the best path forward to enact a predictable and modern framework that ensures that the Internet remains open, innovative, and competitive. The Federal Communications Commission (FCC) surely has a role to play in guiding gradual, adaptive regulatory changes based on that framework, rather than engage in sweeping pronouncements that shift erratically with the political winds. Absent congressional legislation, the regulatory pendulum will endlessly swing—one political party will reinstitute Title II, only for it to be repealed again within the next one or two election cycles. Political partisans will celebrate short-lived victories or raise funds based upon momentary defeats while litigators rack up billable hours.[5] Meanwhile, entrepreneurs will endure a climate where the only certainty is uncertainty, where investors and startup contenders become increasingly risk adverse, and where "first-in," established technology becomes the de facto dominant technology.

The notice-and-comment process confirmed the need for Congress to act by mirroring the dialectical political war around net neutrality itself. The NPRM spawned a campaign-style electronic "air drop" of rhetoric between rival factions that did nothing to inform the agency's decision-making. While, certainly, many legitimate form letters have been submitted, including some generated by CALinnovates, nine million comments—an all-time record—swamped the FCC, and both sides cried foul. Pro-Title II advocates claimed to find 450,000 fake comments; proponents of the NPRM countered that 550,000 pro-net neutrality comments were sent from the

[5] The FCC's reversals on the appropriate classification of broadband Internet access services ("BIAS") have resulted in extensive litigation. *See U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

same email address, or from an address that did not correspond to the name in the comment, or were sent from a fake email address generator.[6]

One analysis concluded that nearly 6 million comments posted in the FCC docket between July 17th and August 4th were likely fake, including an astounding 1.3 million comments from pornhub.com and hurra.de, all supposedly emanating from Russia, Germany and France.[7] Either there are hundreds of thousands of people in a few select countries outside the U.S. who are fearful of watching slow pornography online when they travel to the states *or* there was a concerted effort to fraudulently stuff the ballot box with counterfeit comments. Most telling, whether genuine or fabricated, the comments certainly did not reflect a representative sample of the country's views: According to a poll commissioned by CALinnovates, a majority of respondents favor a legislative solution rather than a strict adherence to Title II, which is facing near-certain extinction.[8]

This NPRM melee has demonstrated one other lesson: the pitfalls of relying on (or hiding behind) notice-and-comment rulemaking to regulate something as important as the future of the Internet, the greatest driver of economic prosperity in modern society. The rationale for agency regulation of the Internet is that agencies can use specialized knowledge to craft well-reasoned

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[6] Mike Snider, *Record 9 Million Comments Flood FCC on Net Neutrality*, USA TODAY (July 19, 2017).

[7] Peter Flaherty, *Another 5.8 Million Fake Net Neutrality Comments Found; 1.5 Million Fakes Put Online for Public Scrutiny*, NATIONAL LEGAL AND POLICY CENTER (Aug. 8, 2017), http://nlpc.org/2017/08/08/another-5-8-million-fake-net-neutrality-comments-found-1-5-million-fakes-put-online-public-scrutiny/.

[8] *Net Neutrality Report Prepared for CALinnovates* (May 2017), at 85, http://calinnovates.org/wp-content/themes/calinnovates/netneutrality-page/CALinnovatesNetNeutralityReport.pdf.

solutions. But without any semblance of institutional continuity by this particular agency on this particular policy question, no specialized knowledge is being brought to bear by the FCC.

The mark of a vital, responsible agency is not merely utilizing its ability to promulgate rules (in the absence of congressional focus and direction), but in its wisdom (all the more in the absence of congressional direction) in deciding when to regulate, and when not to. If Congress needed further evidence that a 20-year void in policy direction can be destructive to the continued growth of the jewel of the American economy, it need not look more than one mile down Independence Avenue to the FCC and its erratic efforts to regulate the Internet. It is therefore essential for the FCC to raise its own voice as an expert agency to seek new direction from the Legislative Branch.

## DISCUSSION

### I. Regulation Should Allow the Internet to Be Both Open and Innovative

*A. Commenters highlighted the importance of net neutrality principles*

Many commenters agreed with CALinnovates' position that net neutrality should remain a guiding principle, and that an open Internet means no blocking or throttling. In the light-touch regulatory environment in place for most of the last two decades, innovation was unimpeded by complex regulatory regimes, and entrepreneurship prospered. However, the Internet has grown. The regulatory approaches that were appropriate in the Internet's infancy may no longer be appropriate now that nearly four billion people regularly use the Internet[9]; and the Internet has become critical to not only the economy, but also to our lives. Prohibitions against per se

[9] International Telecommunication Union, *ICT Facts and Figures 2016* (June 2016), http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2016.pdf.

offenses such as blocking and throttling are now necessary to promote competition by limiting barriers to entry for start-up companies and other innovators.

Numerous commenters highlighted the important role that an open and vibrant Internet plays. For example, Netflix explained that when the company was starting out, "an open internet enabled [it] to offer consumers an innovative option for watching movies and TV shows."[10] Public Knowledge and Common Cause also emphasized that strong net neutrality rules are necessary to protect and promote the value of an open Internet.[11]

Many commenters went a step further, suggesting that an open, innovative Internet is only possible under Title II. For example, Free Press opined that "there is at present no viable foundation for Open Internet rules without Title II" and that returning to a light-touch framework "would be a mistake of epic proportions, unsettling the legal and economic certainty engendered by restoring this successful framework just two years ago."[12] This assessment, while dramatic, is supported by neither data nor facts.

Americans favor open Internet principles. In our poll, a majority of respondents viewed net neutrality more favorably upon learning that it prohibits blocking and throttling, but only 21% of respondents expressed support for Title II.[13] CALinnovates agrees that an open Internet

[10] *See In the Matter of Restoring Internet Freedom*, WC Dkt. No-17-108, Comments of Netflix, Inc. (July 17, 2017), at 2.

[11] *See In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Comments of Public Knowledge and Common Cause (July 17, 2017), at 101.

[12] *See In the Matter of Restoring Internet Freedom*, WC Dkt. No-17-108, Comments of Free Press (July 17, 2017), at 4, 6.

[13] *Net Neutrality Report Prepared for CALinnovates* (May 2017), at 71-72, 82, http://calinnovates.org/wp-content/themes/calinnovates/netneutrality-page/CALinnovatesNetNeutralityReport.pdf.

fosters innovation.[14] Open Internet protections are important bulwarks against blocking, throttling, and other discriminatory practices.

*B. Commenters warned that Title II creates regulatory uncertainty and impedes innovation*

Dozens more echoed the concern that Title II regulation discourages investment and stifles innovation. Companies invest only when they expect a reasonable return on their investment, and the regulatory uncertainty caused by the classification of BIAS as Title II telecommunication services has undermined broadband providers' ability to determine whether and when to invest in expanding their networks. Title II regulation empowers the FCC to impose price controls and to mandate terms of service.[15] Even though the FCC indicated in its Title II Order that it does not plan on exercising those powers in the near future,[16] the specter of increased regulation threatens firms' ability to recoup their investments in broadband networks, deterring those investments. Although the FCC invoked Section 10 of the Telecommunications Act to "forbear" from enforcing more than two dozen provisions of Title II, the Commission also made clear that it may revisit those decisions.[17] And the FCC muddied the waters further by declaring that it could forbear from invoking some provisions yet still apply the substantive requirements of those provisions under its retained authority.[18]

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[14] *See* CALinnovates Internet Freedom Comments at 11 ("The pre-Title II Order approach to regulating the Internet allowed great innovation and rapid development of Internet infrastructure.").

[15] *See* 47 U.S.C. § 201.

[16] *See In the Matter of Protecting and Promoting the Open Internet*, GN Dkt. No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order (rel. Mar. 12, 2015) ("Title II Order"). ¶¶ 451-52.

[17] *See* Title II Order ¶ 493.

[18] *See* Title II Order ¶ 513.

In their comments, BIAS providers expressed concerns about investing in infrastructure given the uncertainty surrounding Title II regulation. A group of municipal ISPs submitted comments that emphasized the substantial costs imposed by the Title II Order. The comments explained that ISPs incur larger legal bills as a result of the Order's complexity and "often delay or hold off from rolling out a new feature or service because [they] cannot afford to deal with a potential complaint and enforcement action."[19] The withdrawal of the threat of rate regulation will mean "greater certainty that [their] investments and development of new services and features will pay off."[20] Mobilitie, the largest privately-held wireless telecommunications infrastructure and services firm in the country, commented that its experience "confirms that regulation depresses investment, driving dollars elsewhere—or abroad."[21]

But the uncertainty generated by the FCC extends far beyond BIAS providers considering investments in broadband. For example, a coalition of 17 small and mid-size manufacturers of products for broadband networks emphasized in joint comments that these reduced investment incentives "cause[] economic injury to companies that make the products which ISPs otherwise would purchase to upgrade their networks," noting that nearly all studies show that small firms account for a significant amount of innovation.[22] Similarly, the Small Business and Entrepreneurship Council stressed that many small businesses and entrepreneurs rely on services from smaller ISPs, and that "[u]ndermining investment and the survival of small ISPs

[19] *See In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Comments of Nineteen Municipal ISPs (May 11, 2017), at 2.

[20] *Id.*

[21] *See In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Comments of Mobilitie, LLC (July 17, 2017), at 5.

[22] *See In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Comments of Ad Hoc Coalition of 17 Small and Mid-Size Manufacturers of Products for Broadband Networks (July 17, 2017), at 3.

undermines entrepreneurship and economic development in these communities, and the ability of existing small businesses to compete and grow."[23] For edge providers who want to partner with ISPs to launch new offerings, the possibility of being subject to additional regulation chills potential innovation.[24]

Other commenters objected to the differential regulation of BIAS providers and other market participants. Urging the repeal of Title II, Oracle stated that "[i]n the complex and converging broadband world, effective regulation requires that all Internet actors operate on a level and stable playing field and are held accountable for conduct that harms competition or consumers."[25] Oracle's remarks were echoed by the Americans surveyed in a poll commissioned by CALinnovates—nearly 90% of respondents agreed that there should be one set of rules that apply to all Internet companies.[26]

These comments reinforce the conclusion that, in the absence of legislation, the FCC, as directed by Congress, should return to the pre-2015 "light touch" approach.[27] There is no evidence that returning to a light-touch regulatory regime would be the catastrophic calamity that some Title II boosters claim to foresee. And it would provide a far preferable "interim" policy

[23] *See In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Comments of Small Business & Entrepreneurship Council (July 16, 2017), at 4.

[24] *See In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Comments of The App Association (July 17, 2017) ("App developers will benefit from the timely deployment of robust 5G wireless network infrastructure, which will ultimately enable the creation and competition of innovative edge services in the market."), at 10-11.

[25] *See In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Comments of Oracle Corporation (July 17, 2017), at 1.

[26] *Net Neutrality Report Prepared for CALinnovates* (May 2017), at 93, http://calinnovates.org/wp-content/themes/calinnovates/netneutrality-page/CALinnovatesNetNeutralityReport.pdf.

[27] *See* CALinnovates Internet Freedom Comments at 11 ("[T]he burdens and uncertainty of regulation under Title II are currently unnecessary and far outweigh any marginal benefits.").

environment in which Congress could make its own judgments about the rules-of-the-road moving forward.

Many preliminary studies have concluded that Title II regulation has already led to lower investment.[28] And although it is difficult to make firm conclusions at this early stage, anecdotal evidence further suggests that, if anything, Title II's initial impact has been negative. For example, Google launched its Fiber product in about a dozen cities before abruptly halting the project in October of 2016.[29] The reasons for the pause are likely myriad, but it may not be too speculative to suggest that Title II had an impact. Meanwhile, Etsy—a staunch Title II advocate that has stated that it would not exist but for net neutrality—has recently slashed its workforce by 22 percent post-Order.[30]

While CALinnovates and others have written about the dangers of "utility-style" regulation as extending far beyond the core of net neutrality principles[31], the negative effect of such innovation-deadening regulation is compounded by the fact that it is occurring in the larger context of a "segmented" regulatory regime, now in force at the FCC. Such regimes have always been competitively suspect—except perhaps in the very formative stage of an industry undergoing dramatic growth potential, or in the presence of a dramatic, unexpected macro-economic development. But where an interim, differential "starter" policy becomes hardened into a regulatory structure, as Title II would surely do, the competitive costs of not moving to a

[28] *See In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Comments of TechFreedom (July 17, 2017) (citing studies that show a loss of $3.3 billion in capital flight in the six largest ISPs alone), at 2.

[29] Brian Fung, *Why Google Fiber Is No Longer Rolling Out to New Cities*, THE WASHINGTON POST (Oct. 26, 2016).

[30] Angelica LaVito, *Etsy to Slash 15 Percent of Its Workforce in Addition to Ongoing Cuts*, CNBC (June 21, 2017), https://www.cnbc.com/2017/06/21/etsy-to-cut-15-percent-of-its-workforce-in-addition-to-ongoing-cuts.html.

[31] *See* CALinnovates Internet Freedom Comments at 3.

more mature policy grid of generic rules of uniform applicability becomes apparent. This is why new exemptions to the antitrust laws are now so heavily disfavored in Congress; once granted, they become almost politically impossible to remove. If Title II proponents sincerely believe that ending Title II will unleash disastrous consequences, we hope they will decide to join CALinnovates in promoting a legislative solution rather than suffer through years of deregulation in the hopes of future electoral success and a corresponding regulatory reversal.

## II. Congress, Not the FCC, Must Guide the Way Forward

### *A. Commenters stated that only Congress can provide needed certainty*

In two years, the Commission has proposed two major changes that have far-reaching consequences for investment and innovation. There is no end in sight to the game of regulatory ping pong:[32] At this rate, we can readily expect the next administration in 2020 or 2024 to usher in a new set of destabilizing regulations, followed by another wave of court battles. This unending oscillation creates uncertainty and chills investment, innovation, and competition.

Many commenters agreed with our conclusion that the FCC alone cannot provide the long-term clarity that innovators, investors, new entrants, and consumers all require. The App Association posited, "In less than a decade, broad regulation has moved from Title I to Title II, and may move back again. Rapid changes between titles create legal uncertainties that hurt investments and innovation, industry and consumers."[33] Oracle agreed, "To achieve a lasting solution to the issues at hand, and to prevent additional shifts in the regulatory framework that quell innovation and investment, Congress should enact legislation that establishes once and for

[32] *See* CALinnovates, *A Short History of Net Neutrality*, YOUTUBE (July 12, 2017), https://www.youtube.com/watch?v=ykWCBDxgoOQ.

[33] *In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Comments of The App Association (July 17, 2017), at 16.

all that broadband internet access is an integrated information service."[34] So long as the Commission has the discretion to determine not only how the rules are applied but also which rules apply, a cloud of uncertainty will hang over the Internet.

*B. Only Congress can craft a bipartisan solution that provides certainty*

If the FCC withdraws the Title II Order, it should work with Congress to enact new legislation that strikes the proper balance between governing the Internet and encouraging innovation. The Telecommunications Act of 1996 rests on the framework established by the Communications Act of 1934, which maintains an antiquated "silos" regime that is a poor fit for the cross-cutting nature of the modern Internet.[35]

Congressional action will ensure that bipartisan compromise, rather than radically shifting agency regulations, will govern regulation of the Internet. Congress is better positioned to assess public opinion than agency regulators relying on millions of (possibly fabricated) online comments. This is especially crucial given the large majority of Americans supportive of the basic legislative framework CALinnovates has outlined.[36] A poll that CALinnovates commissioned found that 74% of Americans supported legislation that codified permanent, bipartisan rules.[37] Industry leaders are part of this chorus of voices—Facebook CEO Mark

[34] *In the Matter of Restoring Internet Freedom*, WC Dkt. No. 17-108, Comments of Oracle Corporation (July 17, 2017), at 6.

[35] *See* Paul Barbagallo, *Communication Act Rewrite Should Eliminate Regulatory 'Silos,' Panelists Say*, BLOOMBERG BNA (Oct. 19, 2012), https://www.bna.com/communications-act-rewrite-n17179870512/ (describing silos); *see also* CALinnovates Internet Freedom Comments at 9-10 (discussing the dated nature of the Telecommunications Act and the FCC's attempts to "shoehorn Internet regulation into a structure designed for regulating telephone, radio, and TV").

[36] *See In the Matter of Protecting and Promoting the Open Internet*, GN Dkt. No. 14-28, Reply Comments of CALinnovates (Sep. 11, 2014), at 3-6.

[37] *Net Neutrality Report Prepared for CALinnovates* (May 2017), at 97, http://calinnovates.org/wp-content/themes/calinnovates/netneutrality-page/CALinnovatesNetNeutralityReport.pdf.

Zuckerberg and Chief Operating Officer Sheryl Sandberg, as well as Reddit co-founder Alexis Ohanian, have called for Congress to take a leadership role on this issue.[38]

Over the past few years, a number of Senators on the key jurisdictional Committees have begun quiet, bipartisan discussions about a careful revision of the telecommunications laws. While these promising talks have been virtually halted by overheated accusations, now is the time for those discussions to begin anew. There is already enough polarity in the First Branch on a wide range of issues. Congress should redouble its efforts to create a modern framework for regulating the Internet in a targeted fashion that fosters openness and innovation.

CALinnovates believes that this new legislation should create a framework that is fair, free, and future-focused. Bipartisan legislation should: (1) offer a clear path forward; (2) ensure fair competition through the prohibition of certain per se offenses; (3) foster permissionless innovation; and (4) maintain low capital entry barriers. A fair, free, and future-focused framework would ensure that providers may not block or throttle lawful services; that Internet "fast lanes" for preferred content are not allowed to develop through paid prioritization with few exceptions; and that strong protections for consumer privacy are maintained, with jurisdiction over privacy regulation vested in the Federal Trade Commission, the agency long charged with addressing privacy concerns. Legislation should also clarify that the FCC may not impose restrictions on Internet services—including edge providers as well as broadband providers—beyond those specified by the new statute. Most crucially, a legislative solution will necessarily mitigate the uncertainty plaguing entrepreneurs and innovators in the industry.

[38] Steven Overly & Ashley Gold, *Tech Industry's Legislation Talk Puts Democrats in Net Neutrality Bind*, POLITICO (July 24, 2017), http://www.politico.com/story/2017/07/24/tech-industrys-legislation-talk-puts-democrats-in-net-neutrality-bind-240888.

## CONCLUSION

In the barely-controlled chaos of the current proceeding, perhaps a single convergent theme emerged: the need for predictable guidelines to sustain an open and evolving Internet. At this historical juncture, only Congress can provide this type of guidance so that the FCC can finally return to its important role of providing technical expertise and, where necessary, enforcement to maintain order and fairness in the Internet ecosystem. For too long, a destructive pattern of congressional abdication and FCC politicization has made innovation and competition concerns mere bystanders to the roar of the crowd.

The first order of business for the key congressional jurisdictional Committees should be to assemble a bipartisan group of Members willing to hold hearings together, draft legislation together, and find a will to modernize the Telecom Act of 1996. At a minimum, the goal should be to establish clear parameters advocated here and by many others: ensure fair competition by prohibiting certain per se offenses; maximize permissionless innovation so that new entrants can contribute to consumer choice; and maintain low entry barriers to avoid market dominance as much as possible. If, at a minimum, Congress can offer these broad guidelines, then the presence or absence of Title II will become irrelevant as a buzzword that has no—and never had—cognizable meaning to the millions of Americans who desire, and depend upon, an open Internet.

This proceeding itself has illustrated the shortcomings of relying on the administrative process to craft a long-term solution to a politically sensitive issue. Regulatory agencies, even independent ones, are not equipped to be the arbiters of political debate, much less one that has morphed into an ideological holy war. And while the FCC will likely feel compelled to put out a final rule that returns to a "light touch" approach, it should do so by simultaneously recognizing its own limitations and by pressing Congress to create a 21st century framework to guide the

evolution of the Internet. While the comment process offered little clear or substantive guidance about the country's views toward net neutrality, our CALinnovates poll results suggest that a broad majority of Americans support a legislative solution. Their voices should be heeded now.

Respectfully submitted,

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